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Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1975

HARRY BENSON,
Petitioner,

v.

SAMBO'S RESTAURANTS, INC.,
Respondent.

Petition for Writ of Certiorari

Law Offices of
ROBERT C. BURNSTEIN

414 - 13th Street
Oakland, CA 94612
Telephone: (415) 836-4400

Attorneys for Petitioner

INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting this Writ	10
Conclusion	13
Appendix—Exhibit A	15
—Exhibit B	41
Affidavit of Service by mail	43

TABLE OF AUTHORITIES CITED

CASES

American R. Exports Co. v. Kentucky (1927) 273 US 269 (71 L.Ed. 639) 11
Brinkerhoff Faris Trust and Savings v. Hill (1930) 281 US 673 (74 L.Ed. 1107) 11
McGirr v. Gulf Oil Corp., 41 Cal. App.3d 246 11
Meyer v. Ford Motor Co., 275 Cal. App.2d 90, 102 12
Robert v. New York (1935) 295 US 264 (79 L.Ed. 1429) (55 S.ct. 689) 10

CODES

California Civil Code, Section 2309 ..... 9, 10
28 USC, Section 1257 2

CONSTITUTIONS

Constitution of the State of California, Article I, section 13 ..... 2, 3
Constitution of the United States, Fifth Amendment, section 1 ..... 2, 3
Constitution of the United States, Fourteenth Amendment, section 1 ..... 2, 3

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In the Supreme Court of the United States to: The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States.

Harry Benson, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of California entered in the above-entitled case on February 26, 1975.

OPINIONS BELOW

The unreported Opinion of the Court of Appeal of the State of California, Second Appellate District, Division

Five, is appended hereto as Exhibit "A". The Order Denying Petition for Hearing in the Supreme Court of the State of California, dated February 26, 1975, is appended hereto as Exhibit "B".

JURISDICTION

The Order of the Supreme Court of the State of California affirmed the Judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five, case number 2 CIV 42864, which Judgment reversed the Judgment of the Superior Court of the State of California for the County of Alameda, in favor of Petitioner herein and against Respondent.

The jurisdiction of this Court is invoked under the provisions of 28 USC §1257.

QUESTIONS PRESENTED

Were the findings of the Court of Appeal, as affirmed by the Supreme Court of the State of California, and the Judgment of Reversal entered thereon, so contrary to the evidence at trial, and to appropriate California law, as to constitute a denial to Petitioner of due process of law as provided by the Fourteenth and Fifth Amendments of the Constitution of the United States and Article I §13 of the Constitution of the State of California?

STATUTES INVOLVED

Constitution of the United States, Fifth Amendment, §1, "No person shall be held to answer for a capital, or

otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Fourteenth Amendment, §1, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, or citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Constitution of the State of California, Article I, §13, "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or

property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The legislature shall have the power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witnesses, from inability or other cause, will not attend at the trial."

STATEMENT

This case involves the validity of an alleged agreement to make a lease. Benson sued Sambo's Restaurants for damages for breach of an agreement to lease certain real property from Benson for use as a restaurant. The term of the lease was to have been twenty-five (25) years, plus a five (5) year option. The agreement is based upon an exchange of extensive correspondence between Benson and one William Wagner, president of Restaurant Properties, Inc., a wholly owned subsidiary corporation of Sambo's. At trial, a jury found for Benson and awarded him damages of One Hundred Seventeen Thousand Five Hundred and 00/100 ($117,-500.00) Dollars.

In August of 1969, one Angelo C. Sposeto and his wife, Mary Sposeto, owned a certain parcel of land

situated on one of the corners of the intersection of East 14th Street and Warren Avenue in the City of San Leandro, Alameda County, California. The Petitioner, Harry Benson, was a licensed real estate broker who was the principal of Benson Realty Company, a California real estate brokerage corporation. On August 25, 1969, Mr. and Mrs. Sposeto granted to Benson Realty Company and exclusive listing for some 22,800 square feet of the 43,185 square feet owned by Sposeto at that particular corner of that particular intersection.

During August of 1969, Mr. Benson contacted the headquarters of Sambo's Restaurants, Inc., in Santa Barbara, California, with a view to interesting Sambo's in a portion of the above-mentioned property. The parcel initially presented to Sambo's was the so-called "front half" of the 43,185 square feet, which "front half" contained 22,360 square feet and had a 180-foot frontage on East 14th Street. Sambo's Restaurants, Inc., suggested that Mr. Benson contact one William L. Wagner, president of Restaurant Properties, Inc., a wholly owned subsidiary corporation of Sambo's. Restaurant Properties, Inc., was a real estate brokerage whose sole purpose was the location for properties to be utilized as Sambo's Restaurants.

On August 21, 1969, Mr. Benson directed a letter to Mr. Wagner at Mr. Wagner's office near Santa Barbara, confirming a telephone conversation held with Mr. Wagner earlier that same day. The letter enclosed a plot plan of the Sposeto property and generally that

Mr. Benson was attempting to "put one or two franchise restaurants on the front half of this property and thought you might be interested."

On August 24, 1969, Benson again called Wagner. Wagner advised Benson that the vice-president of Sambo's Restaurants, Inc., would visit San Leandro the following Wednesday, and Mr. Wagner further requested a plot plan for the property, which was duly sent by Mr. Benson.

On November 14, 1969, Benson spoke with Wagner with specific reference to a valuation price for the land under consideration. After further negotiations, he and Mr. Wagner settled upon a proposal price of $5.25 per square foot.

On March 21, 1970, Mr. Wagner wrote a letter to Mr. Benson confirming a telephone conversation between the two of them which had taken place on March 20, 1970. The letter stated that it could be considered as "our letter of intent for the proposed Sambo's Restaurant on East 14th Street and Warren Avenue in San Leandro . . ." The letter proceeded to outline the basic information suggested to establish the proposed rent and specified a maximum cost of building of $130,000.00

On July 28, 1970, Benson again called Wagner. He advised Wagner that he had discussed the proposed Sambo's lease with some potential buyers of the prop-

erty, and those potenital buyers wanted a higher return on the land and a higher overage rent percentage. Benson and Wagner orally agreed to terms, and Benson said he would present the deal to Sposeto, but that he was advising Wagner in advance that Sposeto would accept. Benson said that if Sposeto did not go through with the lease, Benson would buy the lease from Sposeto.

On August 12, 1970, Wagner wrote a letter to Benson. This letter stated that the letter of March 21, 1970, was to be deemed amended in certain respects. The basic purport of the letter was to reflect the increased percentages requested by Mr. Benson, and Wagner reiterated that the construction ceiling was to be $130,-000.00. The letter also stated that "All other terms and conditions to remain the same."

On August 26, 1970, Mr. Wagner sent an unsigned copy of the form of "Real Property Lease" that Sambo's proposed to use for the lease between itself and Mr. Benson, so that Mr. Benson could present the lease to "developers."

On September 17, 1970, Mr. Benson met with Mr. Sposeto relative to the proposed lease transaction with Sambo's. At that conference, Mr. Sposeto notified Benson that he would not enter into the proposed lease transaction with Sambo's Restaurants, Inc. Thereafter, Mr. Benson communicated Mr. Sposeto's statement to Mr. Wagner and stated that it was necessary to "put someone else on that piece of property . . ."

Thereafter, on February 11, 1971, Mr. Wagner wrote a letter to Mr. Benson. He stated therein that "We are still prepared to lease the subject property on the terms and conditions as contained in (the letter of August 26, 1970) with this one provision. The lease agreement is subject to the final approval of Mr. R. L. Hild, vice-president of Sambo's Restaurants, Inc." Additionally, Wagner requested that the transaction be finalized by April 1, 1971, and indicated that the proposal would be considered outstanding until April 1. "We will consider this lease agreement binding until that date."

On March 21, 1971, Benson made an offer to the Sposetos to purchase the property owned by them. Following negotiations, a deal was concluded and escrow opened on April 19, 1971, and closed on December 15, 1971.

On April 29, 1971, Mr. Benson had a telephone conversation with Mr. Wagner. Wagner advised Benson that Mr. Hild wanted the corner location and would want the entire frontage along East 14th Street, with the service station and the "back half." Benson refused that proposal, characterizing it as "ridiculous." Additionally, Mr. Wagner told Benson that Hild had refused to consent to having a car wash next to the restaurant as desired by Benson, although Hild was willing to have a service station placed "along side" the restaurant. Further communications were had between Mr. Benson and Mr. Wagner and Mr. Hild. On June 1, 1971, Mr. Benson received a letter from Mr. Wagner

that specifically advised Mr. Benson that Hild would not approve the location as long as a car wash was to be placed next door to the restaurant. On June 29, 1971, Benson called Wagner. During that conversation, Wagner advised Benson that Hild definitely would not approve the location next to a car wash. Benson informed Wagner that in his opinion, a lease with Sambo's had been concluded and that Benson was going to continue to operate on that basis. Benson heard nothing further from Wagner or Sambo's after that.

Thereafter, Benson filed suit. Following trial by jury, Judgment was entered for Benson in the sum of One Hundred Seventeen Thousand Five Hundred and 00/100 ($117,500.00) Dollars. Sambo's appealed to the Court of Appeal for the State of California, Second Appellate District, Division Five. The Court of Appeal reversed the Judgment and directed the trial court to enter Judgment for Sambo's. Benson filed a timely Petition for Rehearing, which was denied. Benson thereafter filed a Petition for Hearing in the Supreme Court of the State of California, and the same was denied on February 26, 1975, without opinion.

The Court of Appeal, ruled that under California so-called "Equal Dignities Rule" (California Civil Code §2309), Wagner was required to have written authority from Sambo's in order to bind Sambo's to a lease agreement with Petitioner, and there was no evidence to support the existence of such a writing. The Court of Appeal further found that Sambo's was not estopped to assert the requirement of such writing.

The federal question sought to be reviewed herein was not raised prior to the filing of this Petition for Writ of Certiorari as Petitioner respectfully represents that the denial of due process did not occur until the Court of Appeal of the State of California reversed the Judgment of the Superior Court, which reversal was affirmed by the Supreme Court of the State of California by denying a Petition for Hearing.

REASONS FOR GRANTING THIS WRIT

The Court of Appeal of the State of California ruled that under California so-called "Equal Dignities Rule" (California Civil Code §2309), Wagner was required to have written authority from Sambo's in order to bind Sambo's to a lease agreement with Benson; that there was no evidence to support the existence of such a writing; and that Sambo's was not estopped to assert the necessity of such writing. By denying Benson's Petition for Hearing, the California Supreme Court, by implication, affirmed the findings of the Court of Appeal. Petitioner herein contends that those findings were so contrary to evidence at trial, as to constitute a denial of Petitioner's constitutional right to due process.

Petitioner herein concedes that this Honorable Court will refrain from interfering with the findings of the California Court of Appeal and Supreme Court, except upon the most extreme circumstances revealing the actions of said Courts to be in clear conflict with fundamental principles. In *Roberts* v. *New York* (1935) 295

US 264 (79 L.Ed 1429) (55 S.ct. 689), the Court stated, "If the error is gross and obvious, coming close to the boundary of arbitrary action, there may be a violation of the guaranty." There is ample precedent for granting rleief from incorrect state court decisions. In *American R. Export Co.* v. *Kentucky* (1927) 273 US 269 (71 L.Ed. 639), the Court observed, ". . . We cannot interfere, unless the judgment amounts to mere arbitrary or capricious exercise of power, or is clear conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." See also, *Brinkerhoff Faris Trust and Savings* v. *Hill* (1930) 281 US 673 (74 L.Ed. 1107).

The Opinion of the Court of Appeal, a copy of which is appended hereto, holds that as a matter of law, the "Equal Dignities Rule" precludes a finding that Benson entered into a contract, binding on Sambo's, to lease real property for a term longer than one year. In so holding, the Court relies on the following: (1) the absence of written authority for Wagner to bind Sambo's; (2) the absence of any conduct of Sambo's which would lull a third party into believing that Wagner had such authority; and (3) the prior Opinion of the Court of Appeal in *McGirr* v. *Gulf Oil Corp.*, 41 Cal. App. 3d 246.

It is true, as stated in the Opinion, that there was no corporate resolution nor other document authorizing Wagner to enter into written lease agreements. However, as appears in the Opinion of the Court of Appeal,

the following does appear from the record: Prior to the formation of Restaurant Properties in 1970, Wagner was the head of the real estate department of Sambo's. Restaurant Properties was and is a wholly owned subsidiary of Sambo's. Wagner was the chief executive officer of this wholly owned subsidiary. Sambo's established guidelines for Wagner to follow and led him to believe that negotiations concluded within these guidelines would be acceptable to Sambo's.

Contrary to the implications of the Opinion of the Court of Appeal it is not true that ostensible authority can only be created by conduct of the principal directly with a third person. As stated in the case of *Meyer* v. *Ford Motor Co.*, 275 Cal. App. 2d 90, 102: ". . . the principal need not have been in direct contact with the third party; the manifestation of principal may be to the community at large, and may consist of appointing the agent to a particular position."

Also highly significant is the authority which the principal leads the agent to believe the agent possesses.

Here, Wagner represented in writing to Respondent that he had a contract to lease with Sambo's on the terms agreed to by the parties. One may infer that Wagner reasonably believed that he had authority to reach such agreement in view of (a) his position, (b) his having acted within the criteria given him, and (c) past approval of such conduct. The reliance on these communications, Benson took numerous steps to effec-

tuate the contract and restricted his negotiations with others on the basis of Appellant's being the leasee of a portion of the property in question.

* * *

It is manifest, therefore, that the Court of Appeal made an erroneous finding, contrary to existing California law, permitting Sambo's to rely upon the lack of written authority.

It is error to sanction a pattern of conduct on the part of Sambo's which led the principal officer of its wholly owned subsidiary and a third party, to believe that such officer had the authority to enter into a contract to make a long-term lease. Such a finding is manifestly unjust and so clearly contrary to the principles of fairness as to deny to Benson due process of law.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Law Offices of
ROBERT C. BURNSTEIN
By: HARVEY W. STEIN,
Counsel for Petitioner

APPENDIX

APPENDIX

EXHIBIT A

NOT FOR PUBLICATION

Court of Appeal, Second Dist. Filed Dec. 3, 1974.
Clay Robbins, Jr., Clerk.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HARRY BENSON,
Plaintiff and Respondent,

v.

SAMBO'S RESTAURANTS, INC.,
Defendant and Appellant.

3d Civil
No. 42864
(Sup.Ct.
No. 95751)

Appeal from a judgment and an order of the Superior Court of Santa Barbara County. John T. Rickard, Judge. Reversed with directions.

Hugh J. Haferkamp and George L. Wittenburg, Cavalletto, Webster, Mullen & McCaughey, and Hugh J. Haferkamp and George L. Wittenburg for Defendant and Appellant.

Robert C. Burnstein for Plaintiff and Respondent.

Defendant Sambo's Restaurants, Inc. (Sambo's) appeals from a judgment entered on a jury verdict in

favor of plaintiff Harry Benson (Benson) for $117,500, and from the denial of Sambo's motion for judgment notwithstanding the verdict. The action is one for breach of an alleged agreement by Sambo's to lease certain real property from Benson for a Sambo's restaurant. The alleged agreement is based on an exchange of correspondence between Benson and William Wagner, president of Restaurant Properties, Inc. (RPI), a corporation wholly owned by Sambo's.

Sambo's contends the correspondence was merely preliminary negotiation and was not sufficiently definite to constitute a contract to lease property; that there is no writing signed by Sambo's to satisfy the statute of frauds, Civil Code section 1624, subdivision 4; and that Wagner had no authority to bind Sambo's (see Civil Code section 2309,[2] the so-called "equal dignities" rule).

THE CORRESPONDENCE BETWEEN BENSON AND WAGNER

In 1969 Angelo C. Sposeto and his wife owned a parcel of land on the corner of East 14th Street and Warren Avenue in San Leandro, California. They entered into a listing agreement with Benson, a licensed real estate

[1]"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

". . . .

"4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party to be charged."

[2]"An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

broker doing business as Benson Realty Company (later Harry J. Benson, Inc.), to sell or lease the property. Benson contacted Sambo's with a view to interesting Sambo's in the property. Sambo's referred Benson to Wagner, a licensed real estate broker.

On August 21, 1969, Benson wrote to Wagner as follows:

"Dear Mr. Wagner:

Confirming our conversation of today, I am enclosing a plot plan of the property that is available on the corner of East 14th Street and Warren Avenue in San Leandro. The property is 43,185 sq. ft., however, I have arranged for a buyer on the back half, leaving approximately 22,360 sq. ft. with 183 ft. frontage on East 14th Street available. This corner is considered downtown San Leandro.

I am trying to put one or two franchise restaurants on the front half of this property, and thought you might be interested. Knowing San Leandro as well as I do, and the need in downtown San Leandro for your type of restaurant, I am confident you would have a successful operation.

May I hear from you at your earliest convenience.

Very Truly yours,
Harry J. Benson"
BENSON REALTY CO.

On August 24, 1969, Benson called Wagner, and Wagner indicated that the vice president of Sambo's would come to look at the property later that week. Benson testified that in late 1969 or early 1970 he and Wagner discussed the footage Sambo's would need for the restaurant and parking, and that they orally agreed on an L-shaped configuration within an 80-foot frontage on 14th Street and extending the entire depth of Warren Avenue and to the back line of the property. On November 7, 1969, Benson sent Wagner two copies of the plot plan for the property, "[i]n accordance with your request, . . ." These plot plans were not introduced into evidence, however. Wagner testified that they were the same as the plot plan, Exhibit B, which was attached to Benson's first letter, of August 21, 1969.

On March 21, 1970, Wagner wrote Benson as follows:

"Re: East 14th Str & Warren Ave
San Leandro, California

Dear Harry:

As per our telephone conversation yesterday, you are to consider this our letter of intent for the proposed Sambo's Restaurant at East 14th Street and Warren Avenue in San Leandro.

Based on a ground valuation of $110,000 ($5.00 per square foot, approximately 22,000 square feet in par-

cel), and our construction cost not to exceed $130,000, the lease terms would be as follows:

> Minimum monthly rental based on 10% annual return on property and 12% on improvements (present cost of improvements is $130,000), versus a 5% overage of the gross sales, triple net, but with a recapture clause of taxes and insurance applied only to the overage. Our basic lease term is 25 years and one five year option. We provide all plans and specifications complete.

As you are aware, the location has been approved by Sambo's. If your lessor is willing to proceed on the terms outlined above, I will prepare the leases for your consideration.

Sincerely yours,

/s/William Wagner
William L. Wagner, Realtor
Restaurant Properties, Inc."

On July 28, 1970, Benson told Wagner that Sposeto wanted 11 percent on the land and 6 percent on the overage. Benson further stated that if Wagner made such offer and Sposeto did not accept, then he, Benson, would personally buy the lease from Sposeto or put a group of investors together to do it.

On August 12, 1970, Wagner responded in a letter as follows:

"Dear Harry:

Please excuse the delay in getting this letter off to you, but we have been in the throws of moving, etc.

As per our telephone conversation, you are to consider our Letter of Intent on East 14th Street and Warren Avenue amended as follows:

> Minimum monthly rental should be based on 11% annual return on cost of land, and 12% annual return on cost of construction, ceiling cost to be $130,000. All other terms and conditions to remain the same.

Will be awaiting your response to this letter.

Sincerely yours,

/s/William L. Wagner
William L. Wagner, Realtor
Restaurant Properties, Inc."

"When letter received Wagner forgot 6% overage which was agreed on 7-28-70 tele conversation. Wagner said he will correct in the lease."

The handwritten comment on the letter was added by Benson. On reading the letter he noted that it omitted reference to 6 percent on the overage. Benson telephoned Wagner, who admitted that they had agreed

to this term in their July 28 conversation. Wagner agreed to enter this on the written lease form, rather than to send a new letter. Benson made the notations of this conversation on the letter. When Wagner subsequently sent the written lease form, it did contain the 6 percent overage figure.

Benson wrote back to Wagner on August 18, 1970, requesting further information:

"Dear Bill:

I talked to your Mr. Del Love today regarding my clients' request for more information. Mr. Love advised me to put in writing to you just what they want, and you will review it and give me an answer.

I would like a letter of intent from Sambo's, containing the following information and conditions:

1. Terms of the lease and any options.
2. The 11% on land will cover $5.00/sq.ft. for plus or minus 22,360 sq.ft.—exact footage to be determined by survey.
3. 12% on cost of improvements, including soils test (if any), permits, fees, and all other costs other than financing. If the ceiling cost is to be $130,000., and the construction costs exceed that amount, Sambo's will either pay cash for the overage, or add it to the ceiling price and pay 12% on the total.
4. Although the letter of intent is to be addressed to Harry J. Benson, Inc., it must contain provision

that the letter of intent is assignable to whomever acts as the Developer, and that Sambo's will, upon request, issue a lease accompanied by all attaching papers, that will embrace the foregoing provisions.

5. Include a copy of the lease form Sambo's proposes to use, for review by the Developers.

6. Letter must state that Sambo's is to be the principal signer of the lease and that they will guarantee all payments due under the lease provisions and terms.

7. If available, submit a current financial statement that is later than the annual report.

In addition to this letter of intent, they would be interested in knowing how many Sambo's are currently operating nationwide, of these, how many are now in overages.

Of course you know, this is probably going to be a syndicate. Mr. Englander of Thomas Pierce & Co. needs all these answers for the questions that will come from the investors.

We would appreciate this information if you can give it to us, Bill, A.S.A.P.—I don't want this deal to cool off.

Very truly yours,

HARRY J. BENSON, INC.
Harry J. Benson
President"

On August 26, 1970, Wagner replied, and enclosed an unsigned lease form, which did not contain a description of the premises. The accompanying letter states:

"Dear Harry:

We have already forwarded some information to Mr. Englander, so perhaps with our previous letter of intent we have covered some of the items you need, per your letter of August 18, 1970. I am, however, enclosing the lease form we would propose to use for the review of the developers, and the current financial statement with interim report, which will bring you more up to date. After you have had a chance to review the lease with the developers, and if everything else looks like it is coming together, then let's prepare a formal letter of intent which can be executed.

Will hope to hear from you soon.

Best regards,

/s/Bill
William L. Wagner, Realtor
Restaurant Properties, Inc."

In a conversation with Wagner, Benson then "accepted the form lease as it stood."

SUBSEQUENT DEVELOPMENTS

Benson contends that at this point in time Sambo's, through its agent Wagner, was bound to enter a lease for the property on the terms mentioned in Wagner's March 21, 1970, letter as amended by his August 12, 1970, letter. Benson views the subsequent events as a breach by Sambo's. Sambo's position is that the correspondence up to this point was merely preliminary negotiation; that Benson subsequently made a counteroffer and did not accept the terms theretofore discussed; and that the property boundaries, plans and specifications were too indefinite to constitute a binding contract.

On September 17, 1970, Benson met with Sposeto, who declined to enter into the proposed transaction with Sambo's. In fact, in February 1971 Sposeto listed the property with another realtor.

Benson eventually purchased the property from Sposeto, making an offer in March 1971, opening escrow on December 15, 1971. Benson's position is that although he did not own the property in August 1970, he had obligated himself in the conversation of July 28, 1970, to acquire it, and therefore he can enforce Sambo's obligation to lease the property.

On October 8, 1970, Benson told Wagner that Benson "had to put someone else on that piece of property" and that he had contacted the "Bubble Machine" people about a service station car wash. But the car wash

people would not go on the "inside" of the property; they wanted the "outside." Benson told Wagner "we have got a lease on the outside, you can stay there if you want but in order to put this PUD, Planned Unit Development, together, I have to put somebody else on there and would you object to moving into the inside and let me put the service station on the outside." Benson testified that Wagner replied, "Well, let us take a look . . . send me a rendering." Wagner testified this is the first time Benson had indicated that the entire parcel must be approved as a total project.

Benson was still waiting to hear whether Sambo's was willing to take the inside, when he received a letter dated February 11, 1971, from Wagner stating:

"Dear Harry:

This letter will update the letter previously sent to your office dated August 6, 1970. [sic[3]]

We are still prepared to lease the subject property on the terms and conditions as contained in that letter, with this one provision. The lease agreement is subject to the final approval of Mr. R. L. Hild, Vice President of Sambo's Restaurants Inc.

In addition, we feel that the transaction should be finalized by April 1, 1971, or we should probably look for another location in the San Leandro area. We will consider this lease agreement binding until that date.

[3]Apparently a typographical error for August 26, 1970.

I will look forward to hearing from you soon, and hope that we can proceed with the final drawing of the lease agreement.

Sincerely yours,

/s/Bill
William L. Wagner, Realtor
Restaurant Properties, Inc."

Wagner and Benson talked on March 12, 1971. Wagner said he needed a lease. Benson said he could not submit a lease until he knew if Sambo's would take the inside, so that the metes and bounds could be drawn up.

In March 1971 Wagner sent Benson a copy of typical plans and specifications for a Sambo's Restaurant. The plans were marked "not for construction."

On April 6, 1971, Benson sent Wagner a plot plan showing the car wash on the outside and a letter stating in part:

"I am not sure whether or not I told you that I am now personally going to build this project and own it. I have two problems, first the property owner knows I want to buy the property and he is holding me up for to [sic] much money, second City Hall will probably take about 90 days to process a Planned Unit Development."

On April 29, 1971, Wagner informed Benson that Mr. Hild of Sambo's would not go along with being next

to a car wash. Benson had a new rendering and plot plan drawn up with the car wash on the inside and Sambo's on the corner. Benson sent the new rendering and plot plan to Wagner on May 19, 1971, together with a letter on the virtues of the car wash. Benson also sent a letter to Mr. Hild, Sambo's first vice president, dated May 27, 1971, extolling the car wash and concluding:

"Please reconsider your position. I know we can work this out so you would be most happy with this location."

Wagner wrote to Benson May 27, 1971, that:

"Dear Harry:

I reviewed the proposed San Leandro location again with Mr. R. L. Hild, Vice President of Sambo's Restaurants Inc. He is still unwilling to approve the location as long as there is a proposed car wash next door.

He has agreed to look at the site with me on our next trip to the Bay Area, but this will not be for two or three weeks, as he will be gone all next week on vacation.

At this point, the decision is "no" unless I can change his thinking at the location one more time.

I wanted you to have the facts, as I definitely do not feel that it looks very good at this point. I should be in

town the end of next week. Perhaps we can discuss it further at that time.

Best regards,

/s/Bill
William L. Wagner, Realtor
Restaurant Properties, Inc."

Talks broke down completely in July 1971. Benson told Wagner that as far as Benson was concerned they had a lease and he was going ahead with the PUD. Benson never heard from Wagner or Sambo's again, and filed this suit in September 1971. Benson has since sold the property to Standard Oil.

FACTS RELATING TO WAGNER'S AUTHORITY

By resolution of Sambo's board of directors on April 10, 1969, the corporate officers authorized to execute real property leases for restaurant sites, and to purchase for future sale and leaseback land for restaurant sites, are "the President or Executive Vice President and the First Vice-President or Secretary." Wagner was not such an officer.

On August 22, 1969, the board of directors of Sambo's made the following resolution, acting upon a recommendation of Mr. Hild "for the creation of a Real Estate Department to be known as Restaurant Properties, and for the employment jointly by that

department and the corporation of William L. Wagner as head of that department."

"RESOLVED: That the corporation create a Real Estate Department to operate under the name of "Restaurant Properties" and that William L. Wagner be employed as manager of that department at a salary of $1,000 per month from Restaurant Properties and $1,000 per month from Sambo's Restaurants, plus a division of net profits from Restaurant Properties after said salary and after other expenses, limited, however, by a ceiling of $50,000 per year on the total compensation to be received by Mr. Wagner (i.e., $24,000 of salary with a limit of $26,000 of division of profits).

RESOLVED FURTHER: That the officers of the corporation are directed to take such steps as are necessary to create the division to be known as "Restaurant Properties," and are given the discretion to create a corporation for that purpose, all of the stock of same to be issued to Sambo's Restaurants, Inc.

RESOLVED FURTHER: That the Board adopt the recommendation of the Stock Option Committee, a copy of which is attached as Exhibit "A" to these minutes, and, accordingly, that an option to purchase shares of the company stock be, and the same hereby is, granted to William L. Wagner for the purchase of 2,000 shares of the stock of this corporation, pursuant to the corporation's Employee Qualified Stock Option Plan; and

RESOLVED FURTHER: That the option price shall be $22 per share, which price is hereby determined by this Board of Directors to be 100% of the fair market value of said stock on the date of the granting of the option; and

RESOLVED FURTHER: That said option be, and it hereby is, granted on the terms and subject to the restrictions set forth in the Employee Qualified Stock Option Plan; and

RESOLVED FURTHER: That the President and Secretary of this corporation be, and they hereby are, authorized and directed to execute an agreement with William L. Wagner in the form heretofore recommended by the Committee and approved by this Board.

" . . . .

RESOLVED: That William L. Wagner is hereby recommended and nominated to the Board of Directors to receive an option to purchase two thousand (2,000) shares of stock; and

FURTHER RESOLVED: That said option be granted on the terms and subject to the restrictions set forth in the Employee Qualified Stock Option Plan, and evidenced by an agreement in the form heretofore recommended by this Committee and approved by the Board of Directors.

Dated: August 22, 1969"

Restaurant Properties did not become incorporated until January 1, 1970. RPI's stock is wholly owned by Sambo's. According to Wagner, his employment by Sambo's prior to incorporation of RPI was necessary in order to give Wagner a stock option, and the salary paid to Wagner by Sambo's prior to incorporation of RPI was later reimbursed by RPI. Prior to taking this position Wagner was a real estate broker in Carmichael.

According to Wagner and Hild, Wagner's function was to negotiate leases for presentation to Hild for approval by Sambo's. RPI earns its income through commissions, in its capacity as a real estate broker. Wagner had no actual authority to enter into a lease on behalf of Sambo's. Wagner worked within guidelines he could expect would be reasonably agreeable to Hild. Hild did not specifically approve the letters sent out by Wagner.

All of Benson's dealings were with Wagner, to whom his first inquiry was referred, except the May 27, 1971, letter Benson wrote to Mr. Hild, and apparently two other conversations, (1) with Del Love (not identified) in August 1970, who referred Benson's request for more information back to Wagner, and (2) with Harold Millett (not identified) who told him in March 1971 who the architect would be.

Prior to joining Restaurant Properties in August 1969, Wagner was a private licensed real estate broker

in Carmichael, California, who had done business for Sambo's as a broker. Benson's first letter (August 21, 1969) to Wagner was addressed to "W. L. Wagner, Realtor" in Carmichael. When Restaurant Properties was formed, Wagner moved his office to Sacramento, and Benson's letter of November 7, 1969, was addressed to him there. After RPI was incorporated, it moved to 3704 State Street in Santa Barbara in July 1970. Benson wrote to "William L. Wagner, Realtor, Restaurant Properties, Inc." there on August 18, 1970. In November 1970 RPI moved to 3760 State Street, Santa Barbara, the same building where Sambo's maintain its headquarters, although on a different floor. Benson wrote to Wagner at that address in May 1971.

CONTENTIONS

Sambo's urges a variety of grounds for reversal of the judgment. Sambo's contends: (1) The correspondence between Wagner and Benson constituted merely preliminary negotiation, not a binding contract. (2) The description of the subject matter of the lease contained in the writings was too indefinite and uncertain to satisfy the statute of frauds because (a) the writings do not contain a description of the boundaries of the land to be leased, and particularly do not conform to the L-shaped configuration with only 80-foot frontage on 14th Street which Benson contends was agreed upon. Sambo's contends Benson's' oral testimony in support of this configuration was inadmissible; and (b) no plans and specifications for the restaurant building on

the site were ever prepared. (3) Even if Wagner's letters of March 21, 1970, and August 12, 1970, are construed as an offer by Sambo's to enter a lease, Benson was not the offeree who could accept such offer; Benson was merely acting as a broker on behalf of Sposeto, who rejected the offer. (4) Wagner had no authority to bind Sambo's to a lease. (5) The jury's finding of damages in the amount of $117,500 is not supported by substantial evidence and was based on speculation.

We find that reversal of the judgment is required for two reasons. First, the record simply cannot support the conclusion that a binding agreement existed. Even putting aside the problem of Wagner's authority to bind Sambo's, the remaining problems, the ambiguities in the boundaries and configuration of the property to be leased, the utter confusion as to the identity of the lessor, the lack of specific plans and specifications for the building, and the disagreement over the location of the restaurant versus the car wash after Benson demanded a planned unit development, make it clear that Benson and Wagner never reached agreement on essential details of the proposed lease.

The second reason is that even if the essential details necessary for a binding agreement were assumed to be present, Wagner had no written authority to bind Sambo's under our recent decision in *McGirr* v. *Gulf Oil Corp.*, 41 Cal.App.3d 246, which we hold to be controlling. In that case the plaintiff, McGirr, had entered into an oral agreement with Gulf Oil Corporation's

agent, one Marks, to lease one of Gulf's gasoline service stations for a period longer than a year. Marks, a sales representative, had no actual authority to enter into such a lease on behalf of Gulf. The plaintiff had relied upon the oral agreement to his detriment, and he sought to hold Gulf liable to perform the agreement on the ground that Marks had ostensible authority to make binding leases on behalf of Gulf, and that Gulf was estopped to rely on Civil Code sections 1624, subdivision 4, and 2309. The plaintiff won a jury verdict, but the trial court granted defendant's motion for judgment notwithstanding the verdict.

We affirmed, holding that although plaintiff had shown that Marks had ostensible authority to enter into leases on Gulf's behalf, and that Gulf was therefore estopped to rely upon the statute of frauds, plaintiff had failed to prove that Gulf was estopped to rely upon the additional requirement of the so-called equal dignities rule that the authority of the agent be in writing (Civ. Code, §2309). We said ". . . where a contract which comes within the statute of frauds is made with an agent of the principal sought to be held, an estoppel to rely on the statute of frauds does not, automatically, dispense with the requirement that the agent's authority must be in writing." (41 Cal.App.3d at p. 256.) We further stated, "[o]f course, even absent such written authority, the principal may be estopped from claiming the benefit of the equal dignities rule" (*id.*), but we found insufficient facts to justify such an estoppel in *McGirr*. (*Id.*, at pp. 256-258.) Analyzing

the principles involved, and reviewing the cases, we concluded that an estoppel to rely upon Civil Code section 2309 requires "some conduct of the principal himself [which] lulls the third person into believing that the agent has written authority or does not need it." (*Id.*, at p. 258.)

Turning now to the facts of the instant case, we find no substantial evidence that Wagner had authority in writing to bind Sambo's to a lease of real property for more than a year, nor of any conduct of Sambo's which would lull a third party to believe that Wagner had such written authority or did not need it. It is clear, in the first place, that Wagner lacked actual written authority to bind Sambo's. By resolution of Sambo's board of directors of April 10, 1969, the only corporate officers authorized to execute real property leases on behalf of Sambo's were the president or executive vice president and the first vice president or secretary. Wagner was none of these officers. Mr. Hild, Sambo's first vice president, testified that Wagner had no actual authority to sign a lease on behalf of Sambo's.

Nothing in the resolution of August 22, 1969, which provided for the creation of Restaurant Properties and the hiring of Wagner, authorized Wagner to execute leases on behalf of Sambo's. It does not even specify what Restaurant Properties is to do. It is true, as Benson argues, that this document provides sufficient evidence to support the inference that Wagner was an employee of Sambo's, since the resolution gave him an

employee stock option and provided for a portion of his salary. But this point is unavailing to Benson, since not every employee of a corporation is entitled to execute, on behalf of the corporation, leases which are required by the statute of frauds to be in writing.

Benson relies upon an exception to the equal dignities rule, where the agent is an executive officer of the corporation. However, as *Jeppi* v. *Brockman Holding Co.*, 34 Cal.2d 11, 17, makes clear, this exception applies only to an *executive* officer of the *principal* corporation. (See *McGirr* v. *Gulf Oil Corp., supra*, 41 Cal. App.3d 246, 256 fn.5; *Moore* v. *Phillips*, 176 Cal.App. 2d 702, 709, 710.) While Wagner was president of Restaurant Properties, Inc., a separate corporate entity, he was not an executive officer of Sambo's.

It is clear therefore that Wagner lacked actual written authority to bind Sambo's. The real issue is whether there was any substantial evident which would estop Sambo's to rely upon Wagner's lack of written authority.[4]

[4]As we stated in *McGirr* v. *Gulf Oil Corp., supra*, 41 Cal.App.3d 246, 256 fn. 5: "We lay aside situations to which section 2309 simply do not apply, such as cases where the agent's authority is ministerial, rather than discretionary (*Ellis* v. *Mihelis*, 60 Cal.2d 206, 214 [32 Cal.Rptr. 415, 384 P.2d 7]), where the agent signs the contract in the presence and at the direction of the principal (*Videau* v. *Griffin*, 21 Cal. 389, 392), where the agent is an executive officer of the principal-corporation (*Jeppi* v. *Brockman Holding Co.*, 34 Cal.2d 11, 17 [206 P.2d 847, 9 A.L.R.2d 1297]) or where the dispute is between the agent and the principal (*Sunset-Sternau Food Co.* v. *Bonzi, supra*, 60 Cal.2d 834, 842). Similarly, we can ignore cases where the agent's initial lack of written authority was cured by a written ratification. (Civ. Code, §2310.) Finally, we are not confronted with a situation where the agent, who lacked written authority was acting for an undisclosed principal who permitted the agent to hold himself out "as the principal with full power to contract." (*Marr* v. *Postal Union Life Ins. Co.*, 40 Cal.App.2d 673, 679 [105 P.2d 649].)"

In *McGirr* v. *Gulf Oil Corp.*, *supra* at pages 251-255, we examined the authorities which have recognized such an estoppel, as follows:

"First, there are the cases where the principal has done something which has caused the third person to believe that written authority exists or is unnecessary.

Thus, a principal may not rely on lack of written authority if he has falsely told the third person that the agent has a "power of attorney" (*Reusche* v. *California Pac. Title Ins. Co.*, 231 Cal.App.2d 731, 735 [42 Cal. Rptr. 262]); he cannot furnish the agent with signed bonds or forms containing blanks, permitting him to fill in the blanks before delivering the papers to third parties and later rely on the agent's lack of written authority to do so (*Dolbeer* v. *Livingston*, 100 Cal. 617, 621 [35 P. 328]; *People* v. *National Auto & Cas. Ins. Co.*, 244 Cal.App.2d 491, 494-495 [53 Cal.Rptr. 297]); he may not give the agent a signed deed pertaining to a transaction and later repudiate impliedly authorized escrow instructions (*Karl* v. *JeBien*, 231 Cal. App.2d 769, 773 [42 Cal.Rptr. 461]); and finally, he may not rely on the agent's lack of written authority to convey property where he has clothed him with indicia of ownership (*Vezaldenos* v. *Keller*, 254 Cal.App. 2d 816, 827 [62 Cal.Rptr. 808].)

The second class of cases in which principals have been estopped to rely on section 2309 of the Civil Code is typified by *Higson* v. *Montgomery Ward & Co.*, 263

Cal.App.2d 333 [69 Cal.Rptr. 497]. In that action for a real estate broker's commission, the defendant-corporation orally authorized one Parker to handle various transactions necessary in the purchase of certain parcels of property, leaving the details to him. In connection with the acquisition with one parcel, Parker, in writing, authorized the payment of a commission to the plaintiff Higson. Resisting payment thereof, the defendant relied on section 2309. This defense was found to be unavailing because "with complete knowledge of the circumstances" the defendant had received the benefits resulting from its oral authorization to Parker. (*Id.* at p. 342; see also *Corporation of America* v. *Harris*, 5 Cal.App.2d 452, 460-461 [43 P.2d 307].)

The common denominator of these two recognized instances of estoppel is that each is based on some conduct of the principal himself. It must be he who lulls the third person into believing that the agent has written authority or does not need it; it must be he who retains the benefits of the contract with knowledge of the circumstances." (Fn. omitted.)

We find no facts in the instant record which would support an estoppel based upon these principles. While Wagner did have in his possession Sambo's standard lease forms, they were not already signed by an executive officer of Sambo's. Wagner sent Benson only an unsigned lease form, to get Benson's signature first, then to submit it to Mr. Hild. (See *McGirr* v. *Gulf Oil Corp.*, *supra* at p. 257 & fn.7; *Monte Carlo Motors, Inc.*

v. *Volkswagenwerk*, 177 Cal.App.2d 107, 111-112.) That Sambo's owned all the stock of RPI and that RPI eventually occupied the same building as Sambo's does not suggest to outsiders that Wagner had written authority to bind Sambo's. That Wagner worked within guidelines suggested by Sambo's is not unusual; any real estate broker would naturally develop only such proposals as he might reasonably expect would be acceptable to his client. There is no evidence Sambo's retained any benefits of the alleged agreement.

While there are references in several of Wagner's letters to "we" or "our letter of intent," and to the "approval" of the location by "Sambo's," these are merely declarations by Wagner, not by Sambo's. It is well established that ostensible authority can be created only by the acts or declarations of the principal, not by those of the agent. A belief that the agent has authority, founded on the agent's statement alone, is not sufficient. (*Dickens* v. *Bunker*, 159 Cal.App.2d 383, 388-389; *McGirr* v. *Gulf Oil Corp.*, *supra* at p. 258; *Monte Carlo Motors, Inc.* v. *Volkswagenwerk*, *supra*, 177 Cal.App.2d 107, 110.)

We find no substanital evidence of conduct on the part of Sambo's which would reasonably lead Benson to believe that Wagner had written authority, as required by Civil Code section 2309, to bind Sambo's to a lease of real property, or that he did not need such authority. It should be noted that Benson was himself a licensed real estate broker with 25 years' experience.

"Real estate brokers are licensed as such only after they have demonstrated a knowledge of the laws relating to real estate transactions . . . and it would seem that they would thus require less protection against pitfalls encountered in transactions regulated by those laws." (*Franklin* v. *Hansen*, 59 Cal.2d 570 575; *Jaffe* v. *Albertson Co.*, 243 Cal.App.2d 592, 603.) Sambo's did nothing to suggest to Benson that in dealing with Wagner, another real estate broker representing Sambo's, Benson was free to ignore the requirements of Civil Code section 2309.

There being no substantial evidence that Wagner had written authority to bind Sambo's or that Sambo's was estopped to insist on such proof, the trial court should have granted Sambo's motion for judgment notwithstanding the verdict.

Accordingly, the judgment and order denying the motion for judgment notwithstanding the verdict are reversed, and the trial court is directed to enter judgment for defendant. (Code Civ. Proc., §629; 6 Witkin, Cal. Procedure (2d ed. 1971) Appeals, §545, p. 4486.)

NOT FOR PUBLICATION.

ASHBY, J.

We concur:

KAUS, P.J.

STEPHENS, J.

EXHIBIT B

Order Due February 28, 1975

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, Civil No. 42864

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BENSON

v.

SAMBO'S RESTAURANTS, INCORPORATED

Respondent's petition for hearing DENIED.

Supreme Court Filed Feb. 26, 1975, G. B. Bishel, Clerk.

Chief Justice Wright.

STATE OF CALIFORNIA }
COUNTY OF ALAMEDA } ss

AFFIDAVIT OF SERVICE BY MAIL

I, Harvey W. Stein, an attorney in the Law Offices of Robert C. Burnstein, attorneys of record for Harry Benson, Petitioner herein, deposes and says that on July 30, 1975, I served a copy of the foregoing Petition for Writ of Certiorari on Sambo's Restaurants, Inc., Respondent herein, by mailing a copy thereof, in a duly addressed envelope, with first class postage prepaid to:

HUGH J. HAFERKAMP and
GEORGE L. WITTENBURG,
CAVALLETTO, WEBSTER, MULLEN
& McCAUGHEY,

112 East Victoria Street
Santa Barbara, CA 93101

HARVEY W. STEIN

Subscribed and sworn to before me
this 30th day of July, 1975.

JAYNE E. STARKS, Notary Public,
in and for the County of Alameda,
State of California.